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# Supreme Court of the United States

BRITISH AMERICAN TOBACCO (INVESTMENTS) LIMITED,
*Petitioner,*

v.

UNITED STATES OF AMERICA,
*Respondent.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

"It is a longstanding principle of American law that legislation of Congress, unless a contrary intent appears, is meant to apply *only* within the territorial jurisdiction of the United States." *EEOC* v. *Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) (*Aramco*) (emphasis added; internal quotation marks omitted). The questions presented are:

1. Whether the D.C. Circuit correctly held, in conflict with decisions of other circuits and of this Court, that the traditional presumption against extraterritoriality is completely irrelevant to determining whether Congress intends a statute to reach the wholly foreign conduct of a foreign corporation, if such foreign conduct is alleged to have had a direct and substantial effect within the United States.

2. Whether the D.C. Circuit, in concluding that the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 *et seq.* (RICO), regulates petitioner's wholly foreign conduct, improperly (a) ignored the presumption against extraterritoriality and affirmative evidence that Congress never intended RICO to apply extraterritorially; (b) borrowed from federal securities and antitrust cases the ill-suited "effects" test as a measure of RICO's extraterritorial reach; (c) approved a watered-down version of that test that conflicts with the test used by other circuits; and (d) relied on the U.S. "effects" of the U.S. conduct of *other co-defendants* and of the "overall" alleged RICO scheme.

## RULE 14.1(B) STATEMENT

In addition to the parties named in the caption, the following entities were parties to the proceeding before the United States Court of Appeals for the District of Columbia Circuit and may therefore be considered respondents under this Court's Rule 12.6: Philip Morris USA Inc., Altria Group, Inc., R.J. Reynolds Tobacco Company, Brown & Williamson Holdings, Inc., Lorillard Tobacco Company, The Council for Tobacco Research-U.S.A., Inc., and The Tobacco Institute, Inc. (all co-defendants with petitioner British American Tobacco (Investments) Limited in the district court); and Tobacco-Free Kids Action Fund, American Cancer Society, American Heart Association, American Lung Association, Americans for Nonsmokers' Rights, and National African American Tobacco Prevention Network (all intervenors in the court of appeals as well as in the district court).

## RULE 29.6 STATEMENT

Petitioner British American Tobacco (Investments) Limited states that the following publicly held parent companies have a ten percent or greater ownership interest in it: British American Tobacco p.l.c.; British American Tobacco (1998) Limited; B.A.T Industries p.l.c.; and British-American Tobacco (Holdings) Limited.

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## PETITION FOR A WRIT OF CERTIORARI[1]

## OPINIONS BELOW

The opinion of the court of appeals (App. 1a-100a)[2] is reported at 566 F.3d 1095. The opinion of the district court (App. 101a-2181a) is reported at 449 F. Supp. 2d 1.

## JURISDICTION

The court of appeals entered judgment on May 22, 2009, and denied rehearing on September 22, 2009. App. 1a, 2182a-85a. On November 10, 2009, the Chief Justice extended the time for filing the petition for certiorari until February 19, 2010. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

Pertinent provisions of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 *et seq.*, are set forth at App., *infra*, 1a-7a.

## STATEMENT

This lawsuit constitutes the federal government's unprecedented use of civil RICO against an entire in-

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[1] Petitioner British American Tobacco (Investments) Ltd. ("BATCo") joins the petitions for certiorari of Philip Morris U.S.A. Inc., Lorillard Tobacco Co., R.J. Reynolds Tobacco Co., and Altria Group, Inc., and incorporates by reference the questions presented and arguments in those petitions.

[2] Citations to "App." refer to the single, jointly captioned appendix filed by BATCo and other petitioners in support of their respective petitions for certiorari. Citations to "App., *infra*," refer to the appendix bound with this petition.

dustry. The government sought far-reaching equitable remedies to "prevent and restrain" (18 U.S.C. § 1964(a)) a scheme by the U.S. tobacco industry and one foreign corporation, petitioner BATCo, to deceive American consumers about the health risks of smoking. The government maintained, and the D.C. Circuit agreed, that RICO's famously open-ended criminal and civil proscriptions extend far beyond the Nation's borders to regulate BATCo's foreign conduct, even though BATCo was never shown to have marketed cigarettes in the United States or to have caused a single fraudulent statement to be made to American consumers. Further review is needed because the decision below compounds conflicts in the lower courts over the meaning of the presumption against extraterritoriality and RICO's extraterritorial reach.

### A. The Government's RICO Claim

In this gargantuan lawsuit, the government contended that, beginning in the early 1950s, defendants Philip Morris USA Inc. (then Philip Morris, Inc.) ("Philip Morris"), R.J. Reynolds American (then R.J. Reynolds Tobacco Company) ("Reynolds"), Brown & Williamson Tobacco Company ("B&W"), Lorillard Tobacco Company ("Lorillard"), and American Tobacco Company ("American") made a concerted effort to manage the public relations and marketing issues arising out of growing evidence of health risks associated with smoking. See App. 8a. Those five U.S. companies jointly created two domestic trade groups – defendants the Tobacco Institute, Inc. ("TI") and the Council for Tobacco Research-USA, Inc. ("CTR") (also known as the Tobacco Industry Research Committee ("TIRC")) – to conduct public relations on their be-

half. App. 9a. According to the government, those U.S. companies and trade groups pursued a joint strategy of "sowing doubt" about the link between smoking and health concerns. *Ibid.* The government claimed that, through these and other actions, the defendants violated civil RICO, 18 U.S.C. § 1962(c) & (d), by conducting or participating in the conduct of an enterprise's affairs through a pattern of racketeering activity (or conspiring to do so).

Included among the defendants – but conspicuously absent from the vast majority of the government's allegations – was petitioner BATCo, a corporation organized under the laws of England and Wales, with its principal place of business in England. See *United States* v. *Philip Morris USA, Inc.*, 321 F. Supp. 2d 82, 84 (D.D.C. 2004). According to the government, although BATCo took no actions in the United States in furtherance of the alleged "enterprise" and its foreign activities did not include any fraudulent statements directed at American consumers, BATCo's conduct in other countries was subject to RICO's proscriptions.[3]

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[3] Until 1979, B&W was a U.S. subsidiary of BATCo. See 321 F. Supp. 2d at 84. From 1979 until 2004, BATCo and B&W were sister corporations with a common parent company (B.A.T Industries p.l.c. until 1998, then BAT p.l.c.). App. 1785a-86a. Effective July 30, 2004, B&W's cigarette and tobacco business was merged with R.J. Reynolds Tobacco Company. Contemporaneously, B&W, now a passive holding company, changed its name to Brown & Williamson Holdings, Inc. ("BWH"), and ceased manufacturing, researching, selling, or marketing cigarettes anywhere in the world. BATCo remains a corporate affiliate of BWH. B.A.T Industries p.l.c. was also named as a defendant, but was dismissed for lack of personal jurisdiction. App. 7a. BATCo is thus the only remaining foreign defendant.

## B. The District Court's Decision

1. After a bench trial, the district court entered judgment against the defendants and issued a lengthy opinion. App. 101a-2181a. The court determined that the defendants had engaged in a "scheme to defraud" by which they sought to obtain money from cigarette sales by deceiving "the American public" about the dangers of smoking. App. 1887a-91a. In furtherance of that scheme, the court found, the defendants had maintained a racketeering enterprise and used mailings and wire transmissions in violation of 18 U.S.C. §§ 1341 or 1343. App. 1944a-49a. This, in turn, the court ruled, violated Sections 1962(c) and 1962(d) of RICO. App. 1965a-67a.

In making those determinations, the district court relied heavily on conduct that involved various defendants *but not BATCo*. For example:

- A 1953 meeting among the presidents of Philip Morris, Reynolds, B&W, Lorillard, and American. App. 1924a.
- The coordinated issuance by other defendants of a "Frank Statement to Cigarette Smokers" in 1954, and later public statements in the same vein. App. 1952a.
- Advertisements run in U.S. markets and paid for by Philip Morris, Reynolds, B&W, American, and Lorillard. App. 206a, 475a-78a.
- The joint creation, management, and funding of TI, TI committees, and CTR, as well as publications generated by and studies funded and

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In this case, the government has not pursued a veil-piercing theory with respect to BATCo and B&W or BWH.

published by those groups. App. 210a, 240a-41a, 415a, 417a-18a, 450a-51a, 468a-70a, 1926a-27a.

- Additional activities of the TI Environmental Tobacco Smoke Advisory Committee, App. 298a-99a, and the Center for Indoor Air Research, App. 1928a.

The district court did not find that BATCo participated in any of these activities.[4]

2. Over BATCo's objections, the district court determined that RICO regulated the company's wholly foreign conduct. App. 1930a-33a. The court pointed to the statute's substantive breadth, noting that RICO "is an expansive statute, broadly construed to reach a wide array of activity." App. 1931a. Next, the court stated that RICO "may apply to conduct which occurs outside the United States as long as it has a substantial direct effect on the United States." *Ibid.* For RICO to apply "extraterritorially," the court opined, a defendant's actions "must meet either the 'conduct' test or the 'effects' test" – tests developed in securities and antitrust cases. App. 1932a. To meet

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[4] Only eleven of the 148 predicate acts of wire or mail fraud alleged by the government involved BATCo. See App. 2127a-28a, 2136a, 2143a-49a, 2164a-65a (Nos. 11, 30, 50-51, 53-54, 57, 60, 63, 103, 106). All eleven were unpublished communications made before 1984 – more than 15 years before this lawsuit for prospective relief was initiated – between BATCo in England and its then-U.S. subsidiary/affiliate B&W, which is now a passive holding company. See note 3, *supra*. None of those decades-old communications was directed at U.S. consumers; none described statements or conduct by BATCo in the United States; and all addressed *foreign activities* by BATCo, including research in England and positions the company took or intended to take before the U.K. Parliament and other foreign regulators.

the "conduct" test, the defendant must have engaged in "conduct within the United States [that] directly caused a foreign injury." *Ibid.* To meet the "effects" test, the defendant must have engaged in foreign conduct that had "substantial," "direct and foreseeable result[s]" in the United States. *Ibid.*

Because BATCo's foreign activities plainly did not satisfy the "conduct" test, the district court examined the "effects" test and concluded it was satisfied for two reasons:

> *First*, many of BATCo's *statements and policies* at issue in this case *concerned* U.S. subsidiary/affiliate Brown & Williamson and potential litigation in the United States. *Second, and most importantly*, BATCo's activities and statements furthered the Enterprise's *overall scheme* to defraud, *which had a tremendous impact on the United States*, as demonstrated in the Findings of Fact.

App. 1932a-33a (emphasis added); see also App. 1933a (emphasizing impact "on interstate commerce" of "all Defendants taken together" having "bought and sold literally over one trillion dollars of goods and services in interstate and foreign commerce since 1954").

The district court did not specify which of BATCo's foreign activities or "statements and policies" it had in mind, much less explain why that foreign conduct had "substantial direct effects" in the United States. App. 1931a-32a. Elsewhere in its opinion, however, the court discussed three categories of BATCo's conduct: (1) BATCo participated in international industry groups, which worked toward a common goal with

U.S. industry groups; (2) BATCo communicated and shared its proprietary research with its then-subsidiary, B&W, which in turn elected *not* to share that research with the U.S. Surgeon General; and (3) two foreign affiliates of BATCo (in Canada and Australia) were alleged to have destroyed documents that might have been relevant to subsequent foreign litigation. App. 692a-93a, 1807a-44a. The district court never found, however, that any of those three categories of foreign conduct directly caused any actual – let alone direct and substantial – effects in the United States.

### C. The Court of Appeals' Decision

A panel of the D.C. Circuit affirmed in large part, vacated the judgment with regard to TI and CTR, and remanded with directions to dismiss those entities from the suit. App. 1a-100a. It also directed the trial court to clarify and make further factual findings concerning whether BWH was reasonably likely to violate RICO in the future, given its current status as a passive holding company. App. 100a; see note 3, *supra*. Most relevant for present purposes, the court of appeals held that RICO reached BATCo's wholly foreign conduct. App. 59a-62a.

The analysis proceeded in three steps. First, the panel declined to accept BATCo's argument that RICO has *no* extraterritorial reach – an argument that rested on the presumption against extraterritoriality, the absence of evidence that Congress intended RICO to apply extraterritorially, and affirmative evidence to the contrary. In the panel's view, it "need not decide" the question "whether RICO has *true* extraterritorial reach" – which the panel defined as "reach[ing] foreign conduct with *no*

impact on the United States" – because the district court had "found BATCo liable on the theory that its conduct had substantial domestic effects." App. 58a (emphasis added). Because "Congress's regulation of foreign conduct meeting this 'effects' test is *not* an *extraterritorial* assertion of jurisdiction," the panel opined, "the presumption against extraterritoriality does not apply." *Ibid.* (internal quotation marks omitted; emphasis in original).

Second, the panel rejected BATCo's argument that the "effects" test was particularly ill suited to an action for forward-looking relief brought under Section 1964(a) of RICO – especially where, as here, the purported domestic effects had occurred decades before this litigation was begun and the aim of the lawsuit was limited to "prevent[ing] and restrain[ing]" future racketeering activity. App. 60a. The panel rejected that argument as having "nothing to do with the case." App. 58a.

Third, the panel held that the district court had correctly determined that the "effects" test was satisfied. App. 59a-60a. The panel relied on BATCo's foreign activities in (a) conducting proprietary nicotine research in England that BATCo shared with its then-subsidiary, B&W, and (b) participating in various international organizations, as well as on (c) "the tremendous domestic effects of *the fraud scheme generally*." *Ibid.* (emphasis added). With regard to BATCo's involvement in international organizations, the panel stated:

> BATCo, in concert with other Defendants, founded, funded, and actively participated in various international organizations, which Defendants themselves saw as instrumental to their efforts to

> perpetuate what the district court found to be their fraudulent scheme in the United States.

App. 59a-60a. As an "example" of how the "Defendants themselves saw" those international organizations as "instrumental," the panel cited an admission by TI (a U.S. trade group to which BATCo never belonged) as well as TI's praise for a foreign trade organization (INFOTAB) of which BATCo was a member.

According to the D.C. Circuit, these determinations – "together with the findings of the tremendous domestic effects of the fraud scheme generally" – demonstrate "that BATCo's participation had substantial, direct, and foreseeable effects in the United States." App. 60a. The D.C. Circuit faulted BATCo, in contending otherwise, for "demand[ing] * * * a nearly unattainable level of specificity." *Ibid.*

## REASONS FOR GRANTING THE PETITION

It is widely recognized that the lower courts "have divided" over "whether RICO applies extraterritorially at all." *Liquidation Comm'n of Banco Intercontinental, S.A.* v. *Renta*, 530 F.3d 1339, 1351 (11th Cir. 2008); see also RAKOFF & GOLDSTEIN, RICO: CIVIL AND CRIMINAL LAW AND STRATEGY § 3.04A, at 3-32.1 (2008) ("no clear consensus has emerged"); SMITH & REED, CIVIL RICO ¶ 6.03[4], at 6-69 (2007) ("courts are divided over whether RICO has extraterritorial application"). The decision below compounds that confusion, as well as the subsidiary conflict over the scope of any such extraterritoriality.

This case raises important and recurring questions concerning the traditional presumption against extraterritorial application of U.S. statutes and the

degree to which Congress intended the federal racketeering statute to regulate persons or activities beyond the Nation's boundaries. The D.C. Circuit largely eviscerated the long-settled presumption – a vital backdrop against which Congress legislates – and replaced it with what amounts to a presumption *in favor of* extraterritoriality. In the D.C. Circuit's view, courts should assume that Congress intends to reach any and all conduct worldwide, including conduct by foreign corporations and individuals, so long as it can be alleged (but not shown) to have substantial effects within the United States. That breathtaking expansion of the United States' legislative jurisdiction is reason enough to grant the petition.

But there is more. The D.C. Circuit also borrowed the "effects" test – developed by the federal courts under the antitrust and securities laws *as measures of Congress's affirmative intent that those particular statutes have extraterritorial reach* – as benchmarks for Congress's intent behind RICO, a very different statute. In so doing, the D.C. Circuit has contributed to the confusion in the lower courts over the scope (if any) of RICO's extraterritorial reach. Moreover, the D.C. Circuit adopted a variant of the "effects" test that conflicts with the test used by other circuits and is so devoid of meaning that, if permitted to stand, it will accord RICO (and many other federal statutes) virtually worldwide application. These developments should be of great concern to this Court, especially in light of the trend – as this case illustrates all too well – to apply civil RICO broadly to new contexts.

## I. The D.C. Circuit's Decision Exacerbates Serious Conflicts And Confusion In The Lower Courts

The decision below deepens conflicts and confusion on three important and recurring issues of federal law: (a) the meaning of the presumption against extraterritoriality; (b) the extraterritorial reach, if any, of RICO; and (c) the meaning and proper judicial administration of the "effects" test. This Court's review is needed to resolve these conflicts and provide much-needed guidance to the lower courts.

### A. The Conflict Over The Meaning Of The Presumption Against Extraterritoriality

The D.C. Circuit acknowledged the "longstanding principle of American law that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial boundaries of the United States." *EEOC* v. *Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) (internal quotation marks omitted) (*Aramco*), *superseded in other respects by* 42 U.S.C. §§ 2000e(f), 12111(4). As this Court has explained, Congress legislates against the backdrop of that traditional presumption against extraterritoriality, which "serves to protect against unintended clashes between our laws and those of other nations." *Aramco*, 499 U.S. at 248. Nevertheless, the D.C. Circuit went on to hold that the presumption was *not even implicated* in this case.

Specifically, the court opined that it "need not decide" the question "whether RICO has *true* extraterritorial reach" because the district court had "found BATCo liable on the theory that its conduct had substantial domestic effects." App. 58a (emphasis

added). That rationale rested on a definition of "true extraterritorial reach" as "reach[ing] foreign conduct with *no* impact on the United States." *Ibid.* Because "Congress's regulation of foreign conduct meeting th[e] 'effects' test is '*not* an *extraterritorial* assertion of jurisdiction,'" the court of appeals reasoned, "the presumption against extraterritoriality *does not apply*." App. 58a (quoting *Laker Airways Ltd.* v. *Sabena, Belgian World Airlines*, 731 F.2d 909, 923 (D.C. Cir. 1984) (emphasis altered)). The D.C. Circuit also cited *Environmental Defense Fund, Inc.* v. *Massey*, 986 F.2d 528, 531 (D.C. Cir. 1993), which had suggested that the presumption "is generally not applied" in instances "where the failure to extend the scope of the statute to a foreign setting will result in adverse effects within the United States." App. 58a.

The D.C. Circuit's understanding of "extraterritoriality" (and thus of the scope of the presumption) conflicts with the decisions of other federal courts. For example, in *Subafilms, Ltd.* v. *MGM-Pathe Communications Co.*, 24 F.3d 1088 (9th Cir. 1994) (en banc), the Ninth Circuit, applying the presumption against extraterritoriality, held that the Copyright Act did not apply to foreign conduct *even if* it resulted in "adverse effects" within the United States. *Id.* at 1097. The en banc court specifically rejected *Massey*'s suggestion that the presumption would be rendered inapplicable by domestic effects even where the conduct at issue was entirely foreign. *Id.* at 1096-97; see also *In re Maxwell Communication Corp.*, 170 B.R. 800, 812-13 (S.D.N.Y. 1994) (rejecting the *Massey* exception). The compelling need to avoid clashes between U.S. laws and the laws of other nations, the Ninth Circuit explained, "fully justifies application" of the presumption, "even assuming *arguendo* that

'adverse effects' within the United States" exist. *Subafilms*, 24 F.3d at 1097.

The D.C. Circuit's novel concept of "true extraterritorial reach" is also inconsistent with the ordinary meaning of "extraterritoriality." See BLACK'S LAW DICTIONARY 625 (8th ed. 2004) (defining "extraterritorial" as "[b]eyond the geographic limits of a particular jurisdiction"); *id.* at 869 (defining "extraterritorial jurisdiction" as "[a] court's ability to exercise power beyond its territorial limits"). Consistent with that ordinary meaning, this Court has long treated laws as having extraterritorial reach if they apply to *conduct that occurs in a foreign country*. See *Aramco*, 499 U.S. at 248 (framing extraterritoriality issue as "whether Congress intended the protections of Title VII to apply to United States citizens employed by American employers *outside of the United States*") (emphasis added); *Sale* v. *Haitian Centers Council, Inc.*, 509 U.S. 155, 173 (1993) (referring to "the presumption that Acts of Congress do not ordinarily apply *outside our borders*") (emphasis added); *American Banana Co.* v. *United Fruit Co.*, 213 U.S. 347, 354, 357 (1909) (Holmes, J.) (the "improbability of the United States attempting to make acts *done in Panama or Costa Rica* criminal is obvious") (emphasis added).[5]

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[5] This Court has adhered to Justice Holmes's understanding of what it means for a law to apply extraterritorially, as the cases cited in text demonstrate, although *American Banana*'s precise holding that the Sherman Act has no extraterritorial application was later substantially overruled. See *Hartford Fire Ins. Co.* v. *California*, 509 U.S. 764, 796 (1993). Commentators also recognize that understanding. See, *e.g.*, Parrish, *The Effects Test: Extraterritoriality's Fifth Business*, 61 VAND. L. REV.

The D.C. Circuit's cramped definition of extraterritoriality (and recognition of an easily satisfied exception to the presumption against extraterritoriality) is also squarely at odds with this Court's teaching that the presumption is important and must be given real teeth. See *Aramco*, 499 U.S. at 248; *id.* at 249-51 (making clear that party urging extraterritorial reach of statute has the burden to "make the affirmative showing" of Congress's "clearly expressed" intent required to overcome the presumption). Since *Aramco*, this Court has rigorously enforced the presumption. In *F. Hoffmann-LaRoche Ltd.* v. *Empagran S.A.*, 542 U.S. 155 (2004), for example, the Court made clear that even if "the more natural reading" of a statute encompasses foreign activity, as long as "the statute's language reasonably permits an interpretation consistent with" the general presumption that Congress seeks to avoid interference with other nations' sovereignty, a court "should adopt" the latter interpretation. *Id.* at 174. See also *Microsoft Corp.* v. *AT&T Corp.*, 550 U.S. 437, 454-55 (2007) (holding that the presumption "tugs strongly against" a statutory construction that would allow extraterritorial application).

Academic commentators have recognized the conflict between the D.C. Circuit's approach and the approach followed by this Court and the Ninth Circuit. Professor William Dodge, for example, has identified alternative meanings that could be ascribed to the presumption. "First," he has explained, "the pre-

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1455, 1456 n.2 (2008) ("A law is extraterritorial when a court applies a domestic law to foreigners for conduct occurring beyond the territorial borders of the nation-state in which the court sits.").

sumption might mean that acts of Congress should apply only to conduct that occurs within the United States, unless a contrary intent appears, regardless of whether that conduct causes effects in the United States" – a view he correctly describes as "the traditional view of the presumption that Justice Holmes articulated in *American Banana*." Dodge, *Understanding The Presumption Against Extraterritoriality*, 16 BERKELEY J. INT'L L. 85, 88 (1998). Alternatively, "the presumption might mean that acts of Congress apply to conduct occurring within *or having an effect within* the United States, unless a contrary intent applies" – a view Professor Dodge attributes to Chief Judge Mikva's opinion for the D.C. Circuit in *Massey*. *Ibid.* (emphasis added); see also *id.* at 89, 101 (noting the conflict between the Ninth and D.C. Circuits); Parrish, *supra*, 61 VAND. L. REV. at 1480-81 (noting absence of "consensus * * * among courts and commentators").

Finally, there can be no doubt that the D.C. Circuit's jettisoning of the presumption was important to the outcome in this case. At best the "RICO statute is silent as to any extraterritorial application" (*North South Finance Corp.* v. *Al-Turki*, 100 F.3d 1046, 1051 (2d Cir. 1996); accord *Poulos* v. *Caesars World, Inc.*, 379 F.3d 654, 663 (9th Cir. 2004); *Alfadda* v. *Fenn*, 935 F.2d 475, 479 (2d Cir. 1991)) – a point the government *never disputed below*. RICO contains no indication that Congress intended it to apply to the foreign conduct of foreign defendants, and it prescribes no standard for determining any extraterritorial reach of RICO liability. Moreover, here as with the statute (Title VII) at issue in *Aramco*, it is telling that "Congress failed to provide any mechanisms for overseas enforcement" of RICO and failed to "ad-

dress[] the subject of conflicts with foreign laws and procedures." 499 U.S. at 256. As the government has elsewhere admitted, "[w]hile the RICO Act authorizes nationwide service of process in civil RICO actions, it *does not authorize service in a foreign country*." U.S. DEPT. OF JUSTICE, CIVIL RICO: A MANUAL FOR FEDERAL PROSECUTORS 160 (1988) (emphasis added). Accordingly, the government simply cannot "make the affirmative showing" of Congress's "clearly expressed" intent that is required under *Aramco* to overcome the presumption against extraterritoriality. 499 U.S. at 250-51. Thus, the presumption should have been dispositive in BATCo's favor in this case.

Indeed, the D.C. Circuit's evasion of the presumption allowed the panel to ignore strong affirmative evidence in both the statute and legislative history of Congress's intent *not* to apply RICO extraterritorially. For example, the court failed to consider Congress's declared purpose in enacting RICO, which was to "seek the eradication of organized crime *in the United States*." Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922, 923 (1970) (emphasis added). Congress made no mention of regulating foreign conduct, and made legislative findings that "*organized crime activities in the United States* weaken the stability of the Nation's economic system" and that "organized crime *in the United States*" had become "widespread." *Id.* at 922-23 (emphasis added); see also *United States* v. *Turkette*, 452 U.S. 576, 588-89 (1981).[6] The D.C. Circuit's flawed ap-

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[6] The legislative history confirms Congress's exclusive focus on "organized crime in the United States." 115 CONG. REC. S5872 (Mar. 11, 1969); see also 115 CONG. REC. S9566-67 (Apr. 18, 1969) (RICO aimed at "stamp[ing] out organized crime in the

proach to the presumption allowed it to ignore these clear markers of Congress's intent (as well as other evidence described below).

### B. The Conflict And Confusion Over The Extraterritorial Reach Of RICO

The district court held that RICO does apply extraterritorially simply because RICO "is an expansive statute, broadly construed to reach a wide array of activity" (App. 1931a-32a) – a consideration that provides a compelling reason why RICO should *not* be extended worldwide. With virtually no supporting analysis, the district court proceeded to adopt both the "effects" and "conduct" tests used in the securities and antitrust contexts as the proper measure of RICO's extraterritorial reach. App. 1932a. The D.C. Circuit approved the "effects" test but also held that the statute was *not* being applied extraterritorially *at all* if that test was satisfied.

Other courts have reached different results based on strikingly different rationales. In contrast to the D.C. Circuit's unexplained borrowing of the "effects" test, the Second Circuit has explained that "specifying the test for extraterritorial application of RICO is delicate work" and has strongly suggested that it would be improper to transplant the "effects" and "conduct" tests to the RICO context. *Al-Turki*, 100 F.3d at 1051-52. As the Second Circuit has explained,

> [T]he tests developed in the securities and antitrust cases are premised on congressional intent

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United States"; "organized crime is increasingly taking over organizations in our country").

> in enacting the Securities Exchange Act and the antitrust statutes, not the intention of Congress concerning RICO. We therefore do not assume that congressional intent in enacting RICO justifies a similar approach to the statute's foreign application.

*Id.* at 1052 (citation omitted); accord *Subafilms*, 24 F.3d 1096 & n.13 (cases involving antitrust and securities laws have turned on "an ascertainment of congressional intent"). The Second Circuit declared it "not at all clear" that the "conduct" test should apply to RICO, since that test's "rationale" – "Congress did not want the United States to become an exporter of fraudulent security instruments" – "does not necessarily" apply to RICO. *Al-Turki*, 100 F.3d at 1052. Compare *Renta*, 530 F.3d at 1352 (among other things, adopting the "conduct" test for the Eleventh Circuit but suggesting that it must be applied "with particular care"). Although the Second Circuit in *Al-Turki* did observe that the "effects" test might be a "more appropriate test" because RICO's civil remedies provision was patterned after the Clayton Act, the Second Circuit had no occasion to decide that "delicate" question since the parties had assumed that the "effects" test applied to RICO and conceded that it could not be satisfied. 100 F.3d at 1052.

Shortly after (and relying heavily on) this Court's decision in *Aramco*, a district court in the Ninth Circuit ruled that RICO does not apply extraterritorially. See *Jose* v. *M/V Fir Grove*, 801 F. Supp. 349 (D. Or. 1991). The case involved foreign seamen working on vessels that sailed from the United States to Japan; the seamen alleged that the vessels' owners violated RICO by making fraudulent misrepresentations

concerning pay scales to them in Japan or in the Philippines. After noting the "effects" and "conduct" tests used in antitrust and securities cases, and carefully analyzing the relevant evidence of Congress's intent, the district court concluded that "the language and legislative history of RICO fail to demonstrate clear Congressional intent to apply the statute[] beyond U.S. boundaries." *Id.* at 357.

Among other reasons, the district court pointed out that "the procedural mechanisms contained within [18 U.S.C. §] 1965" governing service of process "are, on their face, limited to U.S. territory." *Jose*, 801 F. Supp. at 357.[7] The *Jose* court also specifically rejected the rationale adopted by the trial court in this case, explaining that extraterritoriality does not follow from the fact that "RICO has been broadly construed to cover a wide array of *conduct*" within the United States. *Ibid.* (emphasis in original). And, in sharp contrast to the D.C. Circuit panel, the *Jose* court relied heavily on the presumption against extraterritoriality. See *ibid.*[8]

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[7] See 18 U.S.C. § 1965(b) (authorizing service of process only "in any judicial district of the United States"); *id.* § 1965(c) (same for service of subpoenas); *id.* § 1965(d) (same for "[a]ll other process"). The enforcement mechanisms concerning civil investigative demands under RICO are similarly limited. See 18 U.S.C. § 1968(g), (h).

[8] See also *Butte Mining PLC* v. *Smith*, 76 F.3d 287, 291 (9th Cir. 1996) ("We do not suppose that Congress in enacting RICO had the purpose of punishing frauds by aliens abroad even if peripheral preparations were undertaken by them here."); *Castellanos* v. *Pfizer, Inc.*, 2008 WL 2323876, at *2 (S.D. Fla. May 28, 2008) (RICO applies "only to organized crime occurring within the United States or directed at the United States").

In contrast to the D.C. Circuit's decision below, the Ninth Circuit has held (in a case involving the Sherman Act) that the "effects test by itself is incomplete" as a gauge of extraterritorial reach "because it fails to consider other nations' interests" or "the full nature of the relationship between the actors and this country." *Timberlane Lumber Co.* v. *Bank of America*, 549 F.2d 597, 611-12 (9th Cir. 1977). "An effect on United States commerce," the Ninth Circuit reasoned, "although necessary to the exercise of jurisdiction under the antitrust laws, is alone not a sufficient basis on which to determine whether American authority should be asserted in a given case as a matter of international comity and fairness." *Id.* at 613. Instead, courts must consider a number of additional factors bearing on comity and fairness, including "the nationality or allegiance of the parties and the locations of principal places of businesses or corporations," the "potential degree of conflict" with foreign laws and policies "if American authority is asserted," and "the relative importance to the violations charged" of the pertinent foreign conduct. *Id.* at 614-15; accord *Jose*, 801 F. Supp. at 357 (explaining that "the factors employed in *Timberlane*," especially the comity and fairness issues, "weigh against extraterritorial application [of RICO] in this case"). The D.C. Circuit failed to consider any of these factors. Compare *Al-Turki*, 100 F.3d at 1052 (RICO's provision for treble damages "heightens concerns about international comity and foreign enforcement").

Finally, in the absence of a "clear consensus regarding the legal test to use" in this setting, some courts have suggested that RICO might apply extraterritorially to "things in the nature of classic organized crime" (such as drug trafficking), but not to

activities that are far removed from those activities. *Doe I* v. *State of Israel*, 400 F. Supp. 2d 86, 115 (D.D.C. 2005). Thus, in *State of Israel*, which involved RICO claims brought by Palestinians against Israel, Israeli government officials, and settlers in the West Bank, the court held that RICO did not reach the defendants' activities in the West Bank. "Congress intended RICO to apply extraterritorially," the court explained, "but not to cases like this one." *Ibid.* The court distinguished between cases involving "activities like drug-trafficking," which are often conducted by "modern criminal organizations" with "an international infrastructure," and cases that seek to "litigate the political crises of the global community." *Id.* at 115-16 (citing *United States* v. *Noriega*, 746 F. Supp. 1506 (S.D. Fla. 1990)). Had the D.C. Circuit limited RICO's extraterritorial reach to "classic organized crime" activities, BATCo would have prevailed.[9]

Thus, there is substantial disagreement and confusion in the lower courts over the extent, if any, of RICO's extraterritorial reach. See also *Kauthar SDN BHD* v. *Sternberg*, 149 F.3d 659, 671 (7th Cir. 1998) ("[T]here are significant questions pertaining to the extraterritorial scope of RICO."); *Concern Sojuzneshtrans* v. *Buyanovski*, 80 F. Supp. 2d 273, 277 (D.N.J. 1999) (noting that "no clear standard has

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[9] In concluding that RICO has some extraterritorial reach, the *Noriega* court relied, among other things, on Section 1962(c)'s references to "any person" and "any enterprise," phrases that supposedly are "all-inclusive and do not suggest parochial application." 746 F. Supp. at 1516. But see *Small* v. *United States*, 544 U.S. 385, 387-94 (2005) (phrase "convicted in any court" does not include convictions in foreign courts).

emerged" and bemoaning "the lack of a coherent standard"). Although no federal court of appeals has squarely held that RICO has *no* extraterritorial reach, the four circuits other than the D.C. Circuit that have ruled or suggested that RICO has *some* extraterritorial reach have not been clear about what that reach is. See *Renta*, 530 F.3d at 1351 (11th Cir.); *Al-Turki*, 100 F.3d at 1051-52 (2d Cir.); *Doe I* v. *Unocal Corp.*, 395 F.3d 932, 961-62 (9th Cir. 2002) (*Unocal*); *Aerovias de Mexico, S.A.* v. *De Prevoisin*, 2000 WL 992495 (5th Cir. June 29, 2000) (unpublished). In any event, this Court has not hesitated to grant review to reject a flawed interpretation of an important federal statute that has been unanimously adopted by the circuits that have considered the issue. See, *e.g.*, *Alexander* v. *Sandoval*, 532 U.S. 275 (2001); *McNally* v. *United States*, 483 U.S. 350, 355-56 (1987).

### C. The Conflict Over The Meaning Of The "Effects" Test

Under both securities and antitrust case law, the relevant domestic effects must be not only "substantial" but also the direct and foreseeable result of foreign conduct. See also 15 U.S.C. § 6a(1) (requiring a "direct, substantial, and reasonably foreseeable effect" on domestic commerce in certain antitrust cases). "Remote and indirect effects in the United States" will not suffice. *Al-Turki*, 100 F.3d. at 1051. "An effect cannot be direct where it depends on * * * uncertain intervening developments." *United States* v. *LSL Biotechnologies*, 379 F.3d 672, 681 (9th Cir. 2004) (internal quotation marks omitted); cf. *Hemi Group, LLC* v. *City of New York*, 2010 WL 246151, at *7 (U.S. Jan. 25, 2010) (civil RICO's direct relation-

ship requirement for causation is not met if injury is separated from conduct by intervening acts or actors). Unlike the D.C. Circuit, moreover, other circuits all apply these stringent standards against the backdrop of the presumption *against* extraterritoriality. For that reason, those courts require that "specific facts" demonstrate "substantial effects within the United States" before extraterritorial jurisdiction will be exercised under RICO. See *Unocal*, 395 F.3d at 961-62.

The D.C. Circuit nominally asked whether BATCo's wholly foreign conduct had resulted in "a substantial, direct, and foreseeable effect within the United States." App. 59a (citing *Consol. Gold Fields PLC* v. *Minorco, S.A.*, 871 F.2d 252, 261-62 (2d Cir. 1989)). But, in concluding that the test was satisfied, the D.C. Circuit necessarily endorsed a far less rigorous approach. Thus, the panel found sufficient "effects" to justify RICO liability where there were *no* demonstrable U.S. effects directly attributable to BATCo, as would have been required by other circuits.[10]

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[10] The "effects" test actually applied by the D.C. Circuit more closely resembles the formulation developed in an early, influential case involving the Sherman Act, *United States* v. *Aluminum Co. of Am.*, 148 F.2d 416, 443-44 (2d Cir. 1945) (*Alcoa*), under which foreign conduct could be regulated if it was "intended to and actually * * * ha[d] an effect on United States imports or exports which the statute reprehends." *Al-Turki*, 100 F.3d at 1051-52 (citing *Alcoa*). That formulation, however, predated Congress's 1982 amendment of the antitrust laws. See 15 U.S.C. § 6a(1). Many lower courts have continued to apply the more lenient *Alcoa* formulation or its variants, see H.R. REP. NO. 97-686, at 5 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2487, 2490 (describing six different versions of the *Alcoa* "effects" test), in RICO and other cases. See, *e.g.*, *Norex Petroleum Ltd.* v. *Access*

Notably, the district court's lengthy opinion did not include a single factual finding of substantial and foreseeable effects within the United States resulting *directly* from BATCo's foreign activities. In nevertheless affirming that sufficient "effects" had been demonstrated, the D.C. Circuit relied on the following findings: (1) "BATCo conducted sensitive nicotine research for [B&W] abroad and secretly shared the results with [B&W] in the United States," App. 59a; (2) "BATCo, in concert with other Defendants, founded, funded, and actively participated in various international organizations," *ibid.*; (3) TI "admitted that 'the back-wash from events and attacks affecting the industry in smaller countries comes back powerfully to the USA," *id.* at 60a; and (4) TI "praised INFOTAB, an international organization of which BATCo was a founding member, for 'helping the industry to unite in trying to combat the attacks,'" *ibid.* None of those findings establishes that BATCo's foreign activities resulted in direct, substantial, and foreseeable effects. None even refers to activities or statements for which BATCo was directly responsible.

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*Industries, Inc.*, 540 F. Supp. 2d 438, 445-49 (S.D.N.Y. 2007) (in RICO case, separately analyzing "securities law version" and "antitrust version" of "effects" test); *Wiwa* v. *Royal Dutch Petroleum Co.*, 2009 WL 928297, at *4-*8 (S.D.N.Y. Mar. 18, 2009) (same); *Nasser* v. *Andersen Worldwide Societe Cooperative*, 2003 WL 22179008, at *3, *6 (S.D.N.Y. Sept. 23, 2003) (same). This practice – along with the Second Circuit's suggestion that the antitrust and securities-law "effects" tests are somewhat different, see *Al-Turki*, 100 F.3d at 1051-52 – has compounded the confusion surrounding that test and spurred calls for "greater guidance" from this Court. *E.g.*, Parrish, *supra*, 16 VAND. L. REV. at 1460-61.

First, with regard to the results of the proprietary research, conducted in England, that BATCo shared with B&W, the panel relied on the district court's finding that, if an intervening actor – B&W – had chosen to share the research results with the U.S. Surgeon General, the Surgeon General's 1964 report "may have" reached different conclusions about the addictive qualities of nicotine. App. 692a-93a. But the district court acknowledged that it was "impossible to say" whether B&W's choice not to share that proprietary research made any difference. *Ibid.* The uncertain possibility that a choice *made by another company* about the handling of BATCo's research *might have had* an impact on American consumers based on how the U.S. Surgeon General *might have interpreted* BATCo's research is a far cry from the requisite "immediate consequence[s]" and "direct effect[s]." See *Republic of Argentina* v. *Weltover, Inc.*, 504 U.S. 607, 618 (1992). The supposed U.S. effects of BATCo's nondisclosure of research conducted *in England* were thus "speculative at best and doubtful at worst." *LSL Biotechnologies*, 379 F.3d at 681.

Second, the panel relied on the district court's determination that BATCo had participated in foreign trade associations. But there is no evidence – none – that BATCo's participation resulted in any direct or substantial effects in the United States. Compare *Bowoto* v. *Chevron Corp.*, 481 F. Supp. 2d 1010, 1014-15 (N.D. Cal. 2007) (rejecting extraterritorial RICO claims where plaintiff "failed to present evidence of an 'effect'" in United States). BATCo was not a member of TI or CTR; BATCo's limited participation in international organizations that were *not* defendants in this case involved conduct outside of the United States; and there was no evidence that BATCo took

any steps to market or sell its products in the U.S. or otherwise influence U.S. consumers. Even the district court acknowledged that the foreign trade organizations were geared towards "protect[ing] and enhanc[ing] [members'] market positions *in their respective countries*." App. 300a (emphasis added). Only through third-party activities or other uncertain intervening developments could BATCo's foreign trade-organization memberships have had possible U.S. effects. Such effects do not satisfy the traditional effects test. See *LSL Biotechnologies*, 379 F.3d at 681 ("[a]n effect cannot be 'direct' where it depends on such uncertain intervening developments").

Even more far-fetched was the D.C. Circuit's reliance on the actions and beliefs of BATCo's domestic co-defendants. Statements made by TI – a U.S. trade group with which BATCo was never involved – should count for nothing. The fact that *TI* either believed that the *foreign* effects of foreign conduct may have had "back-wash" effects that reached the United States, or praised in vague, general terms an international group of which BATCo was a member, hardly shows that *BATCo*'s foreign conduct had direct, foreseeable, and substantial U.S. effects. Unlike the D.C. Circuit's example of "when a malefactor in State *A* shoots a victim across the border in State *B*," App. 59a (quoting *Laker Airways*, 731 F.2d at 922), no U.S. effects flow directly from any of BATCo's foreign conduct.

Finally, and most improperly, the D.C. Circuit (like the district court) invoked "the tremendous domestic effects of the fraud scheme generally," that is, the acts of "all Defendants taken together." App. 60a, 1933a. It is precisely this type of generalized and in-

direct effect, not directly attributable to BATCo itself, that is insufficient under a properly circumscribed "effects" test.

Once the district court's improper imputation to BATCo of third parties' conduct is eliminated, not a single finding remains that BATCo engaged in any activity that actually resulted in direct and substantial effects in the United States. On these facts, the "effects" test used in other circuits would not have been satisfied. Thus, the D.C. Circuit strayed from other circuits in relying on "butterfly" and "backwash" effects and on a causal chain so long and attenuated that it would make Mrs. Palsgraf blush. Cf. *Hemi Group*, 2010 WL 246151, at *5-7. The "effects" test as applied by the D.C. Circuit and the district court bears no resemblance to the test used in other circuits.

Here, just as in *Empagran*, this Court should correct a ruling of the D.C. Circuit that improperly extends a federal statute abroad beyond what Congress intended. See 542 U.S. at 159 (reversing D.C. Circuit's assertion of jurisdiction over antitrust claims by foreign plaintiffs alleging foreign injuries merely because domestic plaintiffs had alleged domestic injuries from same scheme). By invoking domestic effects from co-defendants' U.S. actions as a basis for legislative jurisdiction over claims against BATCo (App. 60a), the D.C. Circuit committed the same conceptual error it made in *Empagran*. In both instances, the D.C. Circuit improperly justified its assertion of legislative jurisdiction over extraterritorial claims on the

theory that *other* parties sustained or directly caused domestic injuries (*i.e.*, domestic effects).[11]

## II. The Issues Presented Are Important And Recurring

Each of the two related issues presented by this petition arises with great regularity, is highly important, and warrants this Court's review.

A. Whether and to what extent civil RICO applies extraterritorially is of great significance. RICO has been deployed in an increasingly wide array of civil actions since its enactment in 1970. See Warner, *Are The Corporation And Its Employees The Same?: Piercing The Intracorporate Conspiracy Doctrine In A Post-Enron World*, 55 U. KAN. L. REV. 1057, 1063 (2007) ("RICO has been stretched to its maximum breadth"). And, as the cases cited above demonstrate, courts

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[11] Because the circuits are sharply divided over the proper contours of the "conduct" test, this Court recently granted review to examine the extraterritorial reach of the federal securities laws. See *Morrison* v. *National Australia Bank Ltd.*, 130 S. Ct. 783 (2009) (order). This petition presents an excellent opportunity both to clarify the "effects" test and to ensure that the "conduct" test continues to have some independent meaning (because litigants will rarely need to invoke it if the D.C. Circuit's sweeping "effects" test is permitted to stand). At a minimum, the Court should hold this petition pending the decision in *Morrison* because the "conduct" and "effects" tests are "two sides of the same coin" and involve identical inquiries into the directness of the requisite causal link between conduct and effects. *Unocal*, 395 F.3d at 961 ("The 'conduct' test establishes jurisdiction for *domestic conduct* that *directly causes foreign loss or injury*. Conversely, the 'effects' test establishes jurisdiction for *foreign conduct* that *directly causes domestic loss or injury*.") (emphasis in original).

frequently face the question whether to extend RICO extraterritorially.[12]

The D.C. Circuit's new "effects" test would work an unprecedented expansion of RICO. While other circuits continue to limit RICO jurisdiction to cases with truly demonstrable, substantial U.S. effects flowing from a foreign defendant's foreign conduct, the decision below opens the door to lawsuits aimed at foreign conduct by foreign defendants having only the most indirect, speculative, insubstantial, and unproven effects in this country. And, under the logic of the panel's decision, a private plaintiff could state a claim for treble damages under RICO against a foreign defendant simply by joining to the case a co-defendant whose conduct occurred in or had effects in the U.S.

Coupled with RICO's liberal venue provisions, see 18 U.S.C. § 1965(a)-(b), and substantive breadth, the panel's highly attenuated "effects" test could transform D.C. federal courts into a magnet for far-reaching international RICO actions – turning RICO into a global dragnet for extraterritorial activities by foreign actors based on the possibility, however remote, that the "ripples caused by an overseas transaction manage eventually to reach the shores of the United States." *Virtual Countries, Inc.* v. *Republic of S. Afr.*, 300 F.3d 230, 236 (2d Cir. 2002). Congress certainly did not have that in mind when it enacted

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[12] See also SMITH & REED, *supra*, ¶ 6.03[4], at 6-69 to 6-73 (collecting cases); *e.g.*, *Boyd* v. *AWB Ltd.*, 544 F. Supp. 2d 236, 251-53 (S.D.N.Y. 2008); *Government of Dominican Republic* v. *AES Corp.*, 466 F. Supp. 2d 680, 693 (E.D. Va. 2006); *OSRecovery, Inc.* v. *One Groupe Int'l, Inc.*, 354 F. Supp. 2d 357, 365-68 (S.D.N.Y. 2005).

RICO to combat "organized crime activities in the United States" (Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922-23 (1970)), and "[t]o hold otherwise would be to extend RICO liability [all] over the world." *OSRecovery*, 354 F. Supp. 2d at 367.

B. The ramifications of the D.C. Circuit's new methodology are not limited to the RICO context. Because the "effects" test is used in connection with the antitrust and securities statutes, the extraterritorial reach of those statutes has the potential to be greatly expanded as well. Nor is the "effects" test limited to the antitrust and securities laws; courts have similarly borrowed it to determine the reach of a variety of U.S. statutes. Those other statutes include, for example, the Lanham Act, 15 U.S.C. § 1051 *et seq.*, see *McBee* v. *Delica Co., Ltd.*, 417 F.3d 107, 120-21 (1st Cir. 2005); the Foreign Sovereign Immunities Act, 28 U.S.C. § 1602 *et seq.*, see *Virtual Countries*, 300 F.3d at 236; and the National Labor Relations Act, 29 U.S.C. § 151 *et seq.*, see *Dowd* v. *International Longshoremen's Ass'n*, 975 F.2d 779, 791 (11th Cir. 1992).

C. Finally, the D.C. Circuit's flawed definition of "extraterritoriality" – and its recognition of an exception to the presumption against extraterritoriality – have the potential to affect the analysis of legislative jurisdiction in virtually every case. As this case demonstrates, it is easy to allege that foreign conduct causes *some* effect in the United States. Moreover, the D.C. Circuit was quick to uphold a determination by the district court that the effects in this case were substantial and direct even though there was no showing of such effects. The D.C. Circuit simply brushed aside BATCo's insistence on such a showing

(or *any* showing) as a "demand[]" for "a nearly unattainable level of specificity," and it relied instead on the effects of the actions of BATCo's co-defendants. App. 60a. If applied in other cases, this approach would render the presumption against extraterritoriality a dead letter.

Legal scholars have long recognized the risk that the "effects" test could be deployed in a way that "provides no meaningful constraint on the exercise of jurisdiction" and thus "undermine[s] the presumption of territoriality." Parrish, *supra*, 16 VAND. L. REV. at 1474, 1478. That risk has become a reality in this case. This development is especially troubling because of the potentially adverse impact that will be felt by American businesses if other countries reciprocate. See *id.* at 1484-85 ("Americans should be particularly concerned about the democratic legitimacy problems that extraterritorial laws pose now that other countries increasingly seek to apply their laws to Americans."); *id.* at 1488-89 & nn.176-177 (discussing instances of "Europe's recent extraterritorial regulation of Americans"). The watered-down "effects" test used by the D.C. Circuit also exacerbates serious institutional concerns. See *id.* at 1481 ("The 'effects' test has * * * encouraged the judiciary to take on an essentially legislative function by approaching each case on an ad hoc basis.").

## III. The Decision Below Is Erroneous

The D.C. Circuit was wrong to conclude that RICO reaches the wholly foreign conduct of BATCo in this case. Each step in the court's analysis was deeply flawed.

A. For reasons explained above (at 11-17), the D.C. Circuit erred in adopting a cramped and incorrect definition of "extraterritoriality" and in creating a novel exception to the presumption against extraterritoriality. A law is "extraterritorial" if applied to conduct that occurs *outside the territorial limits* of the United States. A law does not cease to be applied extraterritorially merely because the foreign conduct it regulates might have effects within the United States. The D.C. Circuit's novel exception to the presumption against extraterritoriality essentially credits the assumption that Congress *always* intends to regulate conduct by foreign entities anywhere in the world as long as such conduct can be alleged (but not shown) to have direct and substantial effects in this country. That assumption is nonsensical and turns the presumption on its head.

B. Had the D.C. Circuit applied the presumption, it would have concluded that RICO does not regulate BATCo's wholly foreign conduct. The presumption is dispositive because, as explained above (at 15-16), there is nothing in the text, structure, or history of RICO to suggest that Congress intended the statute to be applied extraterritorially. Without "the affirmative intention of the Congress clearly expressed," RICO may not be applied extraterritorially. *Aramco*, 499 U.S. at 248. Beyond that, there is ample *affirmative evidence* in the text and legislative history of RICO that Congress did *not* intend the statute to have an extraterritorial reach. See pp. 16-17 & nn.6-7, *supra*.

C. The D.C. Circuit fared no better in its unexplained conclusion that the "effects" test should be transplanted from cases involving the Sherman Act

and securities laws to the very different setting of RICO, a statute whose stated purpose is to target organized crime and racketeering activities *within* the United States. See page 16-17 & n.6, *supra*. Nor does the fact that "the civil action provision of RICO was patterned after the Clayton Act" (*Al-Turki*, 100 F.3d at 1052 (internal quotation marks omitted)) provide any support for borrowing the "effects" test wholesale from antitrust cases. That shows only Congress's desire to arm private and government RICO plaintiffs with some of the same powerful *remedies* to combat racketeering that were available in antitrust cases. It does not show that RICO and the Sherman Act have exactly the same extraterritorial reach.

Moreover, as *Aramco* makes clear, it is the scope of a statute's *substantive provisions* that provides telling evidence of Congress's intent or lack of intent to regulate extraterritorially. See 499 U.S. at 248-56 (examining substantive provisions of Title VII). The Sherman Act's core substantive proscriptions bar contracts, combinations, or conspiracies "in restraint of trade or commerce * * * with foreign nations" as well as attempted or actual monopolization of "any part of the trade or commerce * * * with foreign nations." 15 U.S.C. §§ 1, 2. The federal courts quickly recognized that these market-protecting provisions relating to exports and imports necessarily covered some foreign conduct, because "United States commerce is affected in some degree by every force affecting the world's markets in which we buy or sell, however indirectly." 1B AREEDA & HOVENKAMP, ANTITRUST LAW ¶ 272d, at 279 (2006); *Alcoa*, 148 F.2d at 443 (same).

RICO is quite different. Unlike the securities and antitrust statutes, RICO is not aimed at protecting markets that have unavoidable international dimensions from anticompetitive conduct or fraud. See Turley, *"When in Rome": Multinational Misconduct and the Presumption Against Extraterritoriality*, 84 NW. U. L. REV. 598, 601 (1990) (explaining that courts "consistently grant extraterritorial relief under 'market statutes,' like the antitrust and securities laws that are primarily intended to protect market interests," but consistently deny it under "nonmarket" statutes such as those relating to employment or the environment). Although RICO includes civil enforcement provisions as well as forfeiture provisions, it is at bottom a criminal statute aimed at punishing racketeering and organized crime. There is nothing comparable in RICO's substantive provisions to the core market-protecting proscriptions of the Sherman Act.[13] Indeed, RICO's predicate acts are all state and federal crimes (and do not include violations of the antitrust laws). See 18 U.S.C. § 1961(1).

D. Finally, for reasons discussed in detail above (at 24-27), the D.C. Circuit was wrong to conclude that the government had carried its burden of demonstrating that BATCo's foreign conduct satisfied the rigorous "effects" test as that test has been traditionally understood and applied by other courts. In fact,

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[13] Moreover, antitrust law is not all of a piece with respect to its extraterritorial reach. The civil remedies provision in RICO (18 U.S.C. § 1964) was patterned after *both* the Clayton Act and the Sherman Act. The substantive provisions of the Clayton Act (relating to price discrimination, tying, exclusive dealing, and mergers) "generally do not reach foreign commerce at all." 1B AREEDA & HOVENKAMP, *supra*, ¶ 272i, at 289.

the government completely failed to show that the foreign conduct of BATCo (as opposed to the U.S. conduct of co-defendants) had *directly* caused any effects in the United States that were both *foreseeable* and *substantial*.[14]

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[14] The district court dealt with the issue of RICO's extraterritoriality in a portion of its opinion holding "that the Enterprise engaged in, and its activities affected, interstate or foreign commerce." App. 1930a-33a. The trial court thus may have erroneously conflated the "effects" test (a measure of Congress's actual intent to regulate extraterritorially under the Sherman Act) with the far more lenient "affecting commerce" standard (a measure of the outer limit of Congress's constitutional authority under the Commerce Clause).

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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